

Before the
Administrative Hearing Commission
State of Missouri



DIRECTOR OF DEPARTMENT
OF PUBLIC SAFETY,

Petitioner,

vs.

SHAYNE M. CORTEZ,

Respondent.

No. 14-0056 PO

DECISION

Shayne M. Cortez is subject to discipline because she committed a criminal offense that was also an act of moral turpitude while on active duty.

Procedure

On January 15, 2014, the Director of the Department of Public Safety ("the Director") filed a complaint seeking to discipline Cortez. Cortez was personally served with the complaint and our notice of complaint/notice of hearing on April 14, 2014. She did not file an answer.

The Director served a request for admissions on Cortez on May 16, 2014. Cortez did not respond to the request for admissions.

The Director filed a motion for summary decision on July 22, 2014. We notified Cortez that she should file any response by August 6, 2014, but she filed nothing.

We may grant a motion for summary decision if a party establishes facts that entitle any party to a favorable decision and no party genuinely disputes such facts. 1 CSR 15-3.446(6)(A).¹ Parties may establish a fact, or raise a dispute as to such facts, by admissible evidence. 1 CSR 15-3.446(6)(B). By failing to respond to the motion for summary decision, Cortez has failed to raise a genuine issue as to the facts the Director established in his motion. *Id.*

The Director relies on Cortez's unanswered request for admissions. Because Cortez did not respond to the request for admissions, she admitted each matter contained therein. Missouri Supreme Court Rule 59.01(a). Section 536.073² and our Regulation 1 CSR 15-3.420(1) apply that rule to this case.

The matters admitted under Rule 59.01 bind the party to whom the requests were addressed and eliminate the need for further proof of the matters admitted. *Killian Constr. Co. v. Tri-City Constr. Co.*, 693 S.W.2d 819, 827 (Mo.App. W.D., 1985), *quoted in Dynamic Computer Solutions, Inc. v. Midwest Marketing Ins. Agency, L.L.C.*, 91 S.W.3d 708, 715 (Mo.App. W.D., 2002). Such a deemed admission can establish any fact, or "application of the facts to the law, or the truth of the ultimate issue, opinion or conclusion, so long as the opinion called for is not an abstract proposition of law." *Briggs v. King*, 714 S.W.2d 694, 697 (Mo. App., W.D. 1986).

The rule that matters admitted under Rule 59.01 bind the party to whom the requests were addressed applies also to *pro se* parties. *Research Hosp. v. Williams*, 651 S.W.2d 667, 669 (Mo. App., W.D. 1983); *see Welty v. State Bd. of Chiropractic Examiners*, 759 S.W.2d 295, 299 (Mo. App. W.D. 1988) (applying the rule to a *pro se* party in a proceeding before this Commission).

Accordingly, the following findings of fact are undisputed.

¹ All references to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update.

² Statutory references are to RSMo 2000 unless otherwise noted.

Findings of Fact

1. Cortez holds a peace officer license issued by the Director that has been current and active since it was issued on December 10, 2012.
2. On or about July 1, 2013, Cortez was on duty at the City of St. Ann Correctional Facility.
3. While working as a peace officer on that date, Cortez placed a taser gun in a male inmate's pelvic/groin region and discharged the taser twice, while the inmate was restrained by a restraint chair inside a cell at the correctional facility.

Conclusions of Law

We have jurisdiction to hear this complaint. Section 590.080.2.³ The Director has the burden of proving by a preponderance of the evidence that Cortez has committed an act for which the law allows discipline. *See Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 229-230 (Mo. App. W.D. 2012) (dental licensing board demonstrates “cause” to discipline by showing preponderance of evidence). A preponderance of the evidence is evidence showing, as a whole, that “the fact to be proved [is] more probable than not.” *Id.* at 230 (*quoting State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D. 2000)).

The Director argues that there is cause for discipline under § 590.080:

1. The director shall have cause to discipline any peace officer licensee who:

* * *

- (2) Has committed any criminal offense, whether or not a criminal charge has been filed;

- (3) Has committed any act while on active duty or under color of law that involves moral turpitude or a reckless disregard for the safety of the public or any person[.]

³ RSMo Supp. 2013.

Cortez admitted to certain facts, and that those facts authorize discipline. But statutes and case law instruct us that we must “separately and independently” determine whether such facts constitute cause for discipline. *Kennedy v. Missouri Real Estate Commission*, 762 S.W.2d 454, 456-57 (Mo. App., E.D. 1988). Therefore, we independently assess whether the facts admitted allow discipline under the law cited.

Criminal Offense – Subdivision (2)

The Director argues that Cortez committed the criminal offense of third-degree assault. Section 565.070 defines that crime.

1. A person commits the crime of assault in the third degree if:

(1) The person attempts to cause or recklessly causes physical injury to another person; or

* * *

(3) The person purposely places another person in apprehension of immediate physical injury; or

(4) The person recklessly engages in conduct which creates a grave risk of death or serious physical injury to another person; or

(5) The person knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative[.]

A peace officer may use force under certain circumstances. For example, § 563.046.1 provides that a law enforcement officer:

need not retreat or desist from efforts to effect the arrest . . . of a person he reasonably believes to have committed an offense because of resistance or threatened resistance of the arrestee. . . . [H]e is . . . justified in the use of such physical force as he reasonably believes is immediately necessary to effect the arrest or to prevent the escape from custody.

Likewise, § 563.056.1 provides that “[a] guard or other law enforcement officer may . . . use physical force when he reasonably believes such to be immediately necessary to prevent escape

from confinement or in transit thereto or therefrom.” However, a peace officer “is prohibited from using any more force than is necessary to effect the arrest; his doing so will constitute an assault.” *State v. Thomas*, 625 S.W.2d 115, 122 (Mo. 1981). Section 563.061.2 provides that “[a] warden or other authorized official of a jail, prison or correctional institution may, in order to maintain order and discipline, use whatever physical force, including deadly force, that is authorized by law.”

From the very few facts in this record, it appears that none of the factors that may authorize the use of physical force was present when Cortez used a taser on the inmate on July 1, 2013. The inmate was restrained, in a restraint chair, in a cell. We agree that Cortez’s actions fall within three prongs of the statute defining assault in the third degree. First, they constituted an attempt to cause physical injury to the inmate. Second, her actions placed the inmate in apprehension of physical injury. Third, they caused physical contact with the inmate that she knew the inmate would find to be offensive or provocative. Thus, Cortez committed the crime of assault in the third degree. We do not find that she recklessly engaged in conduct that would create a grave risk of death or serious physical injury to the inmate, because there is no evidence in the record as to whether a taser could cause such a serious injury.

Moral Turpitude/Reckless Disregard – Subdivision (3)

The Director also argues that Cortez may be disciplined under § 590.080.1(3) for committing an act while on active duty that involves moral turpitude or a reckless disregard for the safety of the public or any person. We agree. Cortez was on active duty at the time of the events in question. By discharging a taser in an inmate’s groin area, Cortez displayed a reckless disregard for the inmate’s safety.

Moral turpitude is:

an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general,

contrary to the accepted and customary rule of right and duty between man and man; everything “done contrary to justice, honesty, modesty, and good morals.”

In re Frick, 694 S.W.2d 473, 479 (Mo. banc 1985) (quoting *In re Wallace*, 19 S.W.2d 625 (Mo. banc 1929)).

While peace officers and jailers may be called upon to use force to prevent escape, maintain order, or prevent violence or harm to themselves or others, unnecessary force is a clear breach of the “duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything ‘done contrary to justice, honesty, modesty, and good morals.’” Cortez breached those duties by inflicting unnecessary violence and force upon an inmate. Her actions involved moral turpitude. There is cause to discipline her license under § 590.080.1(3).

Summary

There is cause to discipline Cortez’s license under § 590.080.1(2) and (3). We cancel the hearing.

SO ORDERED on August 27, 2014.

/s/ Karen A. Winn

KAREN A. WINN
Commissioner